

Internal Revenue Service
memorandum

CC:TL-N-754-91

Br4:MEHara

date: **DEC 27 1990**

to: District Counsel, Louisville CC:LOU-TL

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

This is in response to your October 18, 1990 request for formal tax litigation advice in the above-entitled matter.

ISSUE

Are amounts previously refunded in the context of I.R.C. § 6511(b)(2) made from the amount most recently paid by the taxpayer or from a common pool of total payments made within three years.

CONCLUSION

We are of the opinion that the earlier amounts refunded come from the common pool of payments made, and thus payment of the refund is not barred by I.R.C. § 6511(b)(2).

FACTS

Petitioners obtained an extension until [REDACTED] to file their [REDACTED] federal income tax return. They did not file that return, however, until [REDACTED]. On their [REDACTED] return, the petitioners reported a total tax liability of \$ [REDACTED] of which amount \$ [REDACTED] was paid through withholdings and \$ [REDACTED] was remitted with the return. On [REDACTED] and [REDACTED] petitioners received refunds in the amount of \$ [REDACTED] and \$ [REDACTED] respectively. These refunds totaling \$ [REDACTED] were made pursuant to claims filed by the petitioners within the period of limitations prescribed by I.R.C. § 6511(a).

On [REDACTED] the respondent issued a statutory notice asserting a deficiency for [REDACTED] in the amount of \$ [REDACTED]. The present case is based on that notice. The parties have reached a basis for settlement of this case, the terms of which result in a \$ [REDACTED] overassessment and overpayment for [REDACTED] which will be paid to the petitioners if it is allowed under I.R.C. § 6511(b)(2).

09420

DISCUSSION

I.R.C. § 6511(a) provides that a claim for refund of an overpayment of any tax shall be filed within three years from the time the return was filed or two years from the time the tax was paid. I.R.C. § 6511(b)(1) provides that no refund shall be allowed or made after the expiration of the period prescribed in I.R.C. § 6511(a). Under I.R.C. § 6512(b)(2)(B), a claim for refund need not actually be filed by the taxpayer if a timely claim could have been filed at the time the notice of deficiency was mailed. *Morin v. Commissioner*, T.C. Memo. 1990-440, *Estate of Wheeler v. Commissioner*, T.C. Memo. 1979-321. In contrast to the time limitations of I.R.C. § 6511(b)(1), I.R.C. § 6511(b)(2) limits the amount of a refund that can be obtained. I.R.C. § 6511(b)(2)(A) provides "If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return." I.R.C. § 6511(b)(2)(B) provides "If the claim was not filed within such 3 year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim."

Because of the limitation on the amount of refund allowable contained under I.R.C. § 6511(b)(2), it is crucial to determine whether the earlier refunds made on [REDACTED] and [REDACTED] were paid from: (1) a common pool of payments made within three years of the claims for those refunds,¹ or (2) from a particular payment, in this case, from the [REDACTED] payment of \$[REDACTED]. If the earlier refunds were considered to come from [REDACTED], it could be argued that the earlier refunds depleted the funds to be used.

Neither I.R.C. § 6511(b)(2) nor its legislative history explicitly address this issue.² In *Allstate Ins. Co. v. United States*, 550 F.2d 629 (Ct. Cl. 1977), *acq.*, AOD CC-1978-57 (June 15, 1978), the Claims Court specifically rejected the Government's argument that the refund must come from the amount most recently paid. The court stated:

"Such a construction is not within the words of the statute, nor can we find support for it in the legislative history. . . . Therefore, the ordinary meaning of the language of the statute dictates our result. There exists a pool for "three-year recoveries, and a pool for "two-year" recoveries. The statute gives no indication that monies recovered within the three year rule should come from monies most recently paid, and we refuse to give the statute such a construction here."

¹ The \$[REDACTED] in withholding is considered paid on [REDACTED] I.R.C. § 6513(b)(1).

² The legislative history to I.R.C. § 6511(b)(2) provides that Congress intended this provision to limit late refund claims to the amount of the deficiency only. I.R.C. § 6511(b)(2) was added by the Revenue Act of 1924 and was designed to avoid the possibility that a late payment of a small portion of the tax due might extend the time for filing a claim for refund of the entire tax. S. Rep. No. 298, 68th Cong., 1st Sess. (1924), 1939-1 C.B. (Part II) 266, 289; H. Rep. No. 844, 68th Cong., 1st Sess. (1924), 1939 C.B. (Part II) 300, 308.

The Claims Court consequently looked at the gross amounts paid, not to specific funds. In OM-18892, CC:I-183-77 (Dec. 19, 1977), the Interpretive Division stated that the "2 year pool" and "3 year pool" solution of the Court of Claims, which focuses on gross amounts paid rather than the presence of an individual fund, was a more reasonable solution than the government's position.³ The OM continued:

We believe that this case is correctly decided on its facts, in light of the language of Code § 6511. There is some ambiguity in the language and legislative history of this section, and the government's arguments can be said to be well taken. Nonetheless, it is our view that Congress simply intended to limit the overall amount available for certain classes of refund claims, rather than to set a specific fund out of which refund claims must be drawn and that the Court of Claims decision reflects that intent.

By the adoption of the pool approach, Allstate should be read as rejecting a first-in, first-out approach (FIFO), just as it rejected the LIFO approach advanced by the government. By analyzing this matter under the pool approach, the total overpayment of \$[REDACTED] should be refunded. The initial \$[REDACTED] refunded is viewed as coming from the \$[REDACTED] paid within three years of the initial claims. The instant \$[REDACTED] to be refunded is viewed as coming from the pool of \$[REDACTED] which was paid by the taxpayer within three years prior to and after the date of the statutory notice of deficiency. See *San Joaquin Light & Power Co. v. McLaughlin*, 65 F.2d 677 (9th Cir. 1933) (refund allowed where amount paid within statutory period was sufficient to cover the refund even though a portion of the tax was paid beyond the limitation period).

Although this approach may at first blush appear to be at odds with the approach set forth in Treas. Reg. § 301.6611-1 which provides that interest is to be allowed on overpayments from the date of payment of the first amount which is in excess of the correct tax liability, the regulation interprets an entirely different section with a different legislative history and subject matter. We also do not believe that CCDM (35)(10)42(2) is inconsistent with the views expressed herein.

Hall v. Commissioner, T.C. Memo. 1990-404 and *Morin v. Commissioner*, T.C. Memo 1990-404 are distinguishable and do not require a contrary result. In *Hall* and *Morin*, the court refused to allow a refund under I.R.C. §§ 6511(b)(2) and 6512(b)(2)(B) because the taxpayer had not filed a return within 3 years nor paid taxes within two years prior to the date of the notice of deficiency. In this case, the return, although filed late, was filed within three years of the issuance of the notice of deficiency.

³ *United States v. Bibb Mfg. Co.*, 73 F.2d 367, 369 (5th Cir. 1934) (reasonable and not strained construction favored).

⁴ The \$[REDACTED] is composed of the \$[REDACTED] remitted with the return and \$[REDACTED] paid on [REDACTED]

Please contact Michael E. Hara at FTS 566-3305 if you have any questions or need further assistance in this matter.

MARLENE GROSS
Assistant Chief Counsel
(Tax Litigation)

By:



ROBERT B. MISCAVICH
Senior Technician Reviewer
Branch No. 4
Tax Litigation Division